SUPREME COURT U. S.

APR 1 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1217

EDWARD LOUIS HENDERSON,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1968

No. .....

EDWARD LOUIS HENDERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Edward Louis Henderson respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above styled case on December 19, 1968, affirming the petitioner's conviction. A Motion for Rehearing was filed in the United States Court of Appeals, Fifth Circuit, within the time provided by law, which was denied on the 22nd day of January, 1969.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit in the case is attached hereto as appendix "A", in this petition, and the order denying Rehearing marked appendix "B".

JURISDICTION

The judgment of the Circuit Court for the Fifth Circuit was entered on December 19, 1968. On January 22, 1969, the Motion for Rehearing was denied.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 2101 (f).

QUESTIONS PRESENTED

I.

Whether a Warrantless Search which resulted in the seizure of containers from the backyard of the defendant below, found to contain non-tax-paid whiskey and introduced as evidence, violated the rights of petitioner as guaranteed by the Fourth Amendment to the Constitution of the United States.

II.

Whether city police officers may without a Warrant make an Arrest for a Misdemeanor upon probable cause, when that state's statute prescribing *Arrest Without a Warrant,* allows arrest only if the offense is committed in the officers' presence, or the offender is endeavoring to escape or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant; where that same offense is construed a felony under federal law.

STATEMENT OF FACTS

On the evening of July 28, 1967, at about 6:50 P. M., city police officers received an anonymous telephone call that some whiskey had just been "set" off in the two hundred block of Holloway Street in the City of Macon, Georgia. Driving in the two hundred block of Holloway Street looking into the backyard of petitioner who lives at 2614 Texas Street, they allegedly spotted someone who was thought to be the petitioner with a plastic container in his hand pouring a clear liquid into a funnel. At this point the officers jumped from their car, ran through the premises (backyard) of petitioner and ran around the side of the house chasing the person spotted in the yard, they knocked on the door, no one answered, they went to the back (yard) of the house and started to get the evidence together. A few minutes later petitioner came from an easterly direction into his backyard where the city police officers were at the rear of the house "finishing" getting the evidence together. Petitioner asked what was going on, the city police officer said, "you're under arrest".

In the backyard they found plastic and glass jugs around the back steps and a quantity of non-tax-paid liquor. At the rear of the yard they found two jugs covered with "croker" sacks, both filled with whiskey. About this time the federal agents arrived and re-arrested the petitioner. At all times during and before the unwarranted trespass upon the premises of petitioner he was in legal possession and quiet enjoyment of said premises.

Upon cross-examination, Freeman testified that he did not know whether petitioner owned the whiskey or not; that from the smell they got when they jumped out

of the car they determined the liquid supposedly poured by petitioner to be untaxed whiskey, even though there are several houses around the neighborhood that he (Freeman) knows sell liquor. No fingerprints were taken off the jugs.

The proper Motion to Suppress was denied, the cause was set for trial on May 27, 1968. At trial petitioner renewed his Motion to Suppress and was denied relief. The trial proceeded, resulting in a verdict of guilty being returned against petitioner.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES

A. Federal Rules of Criminal Procedure, Rule 41, 18 U. S. C. A.

B. 26 U. S. C. A., Sec. 5205 (a) (2), 5604 (a).

C. 18 U. S. C. A. 3053.

D. Title 26, Georgia Code, Section 101, *Misdemeanor* "every other crime not punishable by death or imprisonment in the penitentiary."

E. Title 58, Section 101.

F. Title 27, Georgia Code, Section 207, *Arrest Without a Warrant,* "an arrest for a crime may be made by

an officer, whether under a warrant or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape or for other cause there is likely to be a failure of justice for want of an officer to issue a Warrant."

REASONS FOR GRANTING THE WRIT

The intrusion upon petitioner's property, to search and arrest him without a warrant for a misdemeanor based upon probable cause, violated the rights of petitioner under the Fourth Amendment to the United States Constitution.

"The presence of a search warrant serves a high function. Absent some grave emergency the Fourth Amendment has interposed a magistrate between the citizen and the police . . . not to shield criminals nor to make the home a safe haven for illegal activity, it was done so an objective mind might weigh the need to invade the law." *McDonald* v. *United States,* 355 U. S. 451, 69 S. Ct. 191 (1948). The officers in this case with ample time to secure a warrant failed to do so. The Fourth Amendment protection insofar as houses are concerned "has never been restricted to the interior of the house but has extended to open areas immediately adjacent thereto." *W. H. Wattenburg* v. *United States,* 388 F. 2d 853 (1968).

The Fourth Amendment is to safeguard the privacy of individuals and to prevent arbitrary invasion by government, local or federal. *Camera* v. *Municipal Court,* 387 U. S. 523, 528, 87 S. Ct. 1727, 1730 (1967). The Fourth Amendment is liberally construed. *Go-Bart Importing Company* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

In the State of Georgia, transportation and possession of non-tax-paid whiskey is a misdemeanor. Like-

wise in said State an officer is precluded from making an arrest without a warrant for a crime unless committed in his presence.

In the Court's opinion handed down December 19, 1968, the Court concluded that the seizure was incidental to a lawful arrest based on probable cause, and cited *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), but in Rabinowitz, supra, defendant was suspected of committing a felony and the probable cause element was properly before the Court. In the instant case, petitioner was suspected of committing a misdemeanor by city police officers, an offense where probable cause is not an element, and is not the gravamen of the penalty for illegal possession in the State of Georgia.

The city officers were the ones upon petitioner's premises, they made the arrest and subsequently turned petitioner over to federal officers, who prosecuted petitioner for the commission of a felony when his arrest by city officers could not be a greater offense under the Georgia Law than a misdemeanor.

Therefore, for the above reason we submit that the city officers' reliance on the probability, to search to support the arrest in his case is erroneous inasmuch as no felony was being committed under applicable state law and probable cause not being an element of the offense denominated as a misdemeanor in Georgia. The city officers were seeking non-tax-paid whiskey, possession of which is a misdemeanor, so there was no basis for the introduction of the element of probable cause in the case.

The city officers did not rely upon observation of the commission of a misdemeanor to support the arrest, they relied upon probable cause, entered petitioner's premises, arrested him and turned him over to federal officers who

arrived some time later. Petitioner therefore submits that his motion to suppress should have been sustained and the search vitiated.

CONCLUSION

For the foregoing reason, this petition for writ of certiorari should be granted.

Respectfully submitted,

B. CLARENCE MAYFIELD
Attorney for Petitioner

910 West Broad St.
Savannah, Georgia 31401

CERTIFICATE OF SERVICE

I, B. CLARENCE MAYFIELD, hereby certify that I have served a copy of the within and foregoing Brief for Appellant upon Mr. Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Box U, Macon, Georgia 31202, by mailing a copy of the same to him by United States Mail, postage prepaid, addressed as indicated above.

This 26th day of March, 1969.

B. CLARENCE MAYFIELD
Attorney for Petitioner

910 West Broad St.
Savannah, Georgia 31401

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26254

EDWARD LOUIS HENDERSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(December 19, 1968).

Before THORNBERRY and AINSWORTH, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM: Appellant Edward Louis Henderson was convicted on charges of violating 26 U.S.C. § 5205 (a) (2) and § 5604 (a). The trial court admitted into evidence non-tax-paid whiskey seized by the arresting

officers, acting without a search warrant, in appellant's backyard. In this appeal, appellant maintains that the evidence was seized in violation of his Fourth Amendment rights and that the district court erred in denying his motion to suppress.

The record reveals that city detectives, following a tip that illicit whiskey was set off behind the residence adjacent to that of the appellant, drove past the house and observed appellant, standing in the backyard among twenty-five to thirty one-gallon jugs, pouring a clear liquid into a funnel held by a companion. Both men fled, but appellant returned a few minutes later, at which time he was arrested. In the meantime, one of the officers searched the backyard and seized several containers, found to contain non-tax-paid whiskey, which was introduced into evidence.

We have concluded that the admission of the whiskey into evidence was proper because the seizure of the whiskey was incidental to a lawful arrest based on probable cause. *United States* v. *Rabinowitz,* 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653. The detectives had adequate facts and information to believe that an offense was being committed in their presence; and therefore, under the applicable state law, by which the arrest must also be tested, *Lovelace* v. *United States,* 5th Cir. 1966, 357 F.2d 306, properly attempted the arrest without a warrant. *Ga. Code Ann.* 27-207 (1953 Rev.). Probable cause for the arrest existed independently of the fruits of the search; the arrest was perfected within ten minutes of the search and seizure; and therefore, it is immaterial in these circumstances that the search preceded the arrest. *Lovelace* v. *United States, supra,* 357 F.2d at 311; *Holt* v. *Simpson,* 7th Cir. 1965, 340 F.2d 853, 856.

Accordingly, the judgment of the trial court must be and hereby is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26254

D. C. Docket No. 8561

EDWARD LOUIS HENDERSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia

Before THORNBERRY and AINSWORTH, Circuit Judges, and DAWKINS, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 19, 1968

Issued as Mandate: Jan 30, 1969

APPENDIX "B"

Thornberry [515]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26254

EDWARD LOUIS HENDERSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(January 22, 1969)

On Petition for Rehearing

Before THORNBERRY and AINSWORTH, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM 1968

No. 1217

EDWARD LOUIS HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968 (II R. 68; Pet. App. A 3). A petition for rehearing was denied on January 22, 1969 (II R. 69–74). The petition for a writ of certiorari was filed on April 1, 1969 and is, thus, out of time under Rule 22(2) of this Court.

QUESTION PRESENTED

Whether non-taxpaid whiskey was properly seized from petitioner's backyard.

STATUTE INVOLVED

Code of Georgia, Title 27–207 provides:

> An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

STATEMENT

After a nonjury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on a one-count indictment charging possession of non-taxpaid whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (I R. 1, 3). On May 27, 1968, he was sentenced to imprisonment for one year and a day (I R. 61–62). The court of appeals affirmed (Pet. App. A 3).

The court held a pre-trial hearing on petitioner's motion to suppress evidence of the non-taxpaid whiskey seized at the time of his arrest. City detective Freeman of Macon was the only witness at this hearing and the court denied the motion (I R. 11, 40). At the trial Freeman testified substantially as he had done on the motion to suppress.

Freeman's testimony showed that, on July 28, 1967, at about 6:00 p.m., he received a telephone call from an anonymous informant that some whiskey had just been set off in the two hundred block of Holloway Street. Freeman called federal agents Farmer and Braxton and told them to meet him and detective

Joyner at this address (I R. 16, 41–42). When Freeman and his partner passed this address they saw, from a distance of about 30 feet, petitioner in his backyard. He had a plastic 5-gallon container in his hands and, with the aid of another man, was pouring a clear liquid through a funnel into a gallon jug. There was a strong odor of alcohol in the vicinity (I R. 16, 41–42). Freeman, who had known petitioner for thirty years, knew that petitioner had a reputation for being in the liquor business (I R. 24–25).

When the officers stopped their car and alighted, both men looked up and ran toward the front of petitioner's house (I. R. 27). The officers ran through the premises around the side of the house and heard a door slam at the front of the house. They knocked on the door but there was no answer. The officers went to the backyard and then heard another door slam. They ran back to the front of the house and observed petitioner running down the street (I R. 30, 38, 42–43). The officers went to the backyard where they found 14 plastic one-gallon jugs and three glass jugs containing whiskey. The five-gallon plastic jug from which petitioner had been seen pouring a liquid contained about three gallons of whiskey. At the rear of the lot, the officers found two five-gallon plastic jugs covered up with sacks, both full of whiskey (I R. 43). There were no tax stamps on any of the whiskey (I R. 44, 50).

About ten minutes later petitioner returned and asked the officers what was going on. They told him he knew what was going on, and that he was under

arrest (I R. 43, 51). A few minutes later, federal agents arrived and told petitioner again that he was under arrest and advised him of his rights (I R. 43).

ARGUMENT

As noted above, the petition for a writ of certiorari is out of time. In any event, no issue of substance is raised requiring review by this Court.

Petitioner does not deny that the local officers had probable cause to believe that he was in possession of non-taxpaid liquor at the time they entered the backyard. His claim is that the officers could not rely on probable cause since, under Georgia law, possession of non-taxpaid whiskey is a misdemeanor and officers may arrest only for a crime committed in their presence. But the officers did observe the offense being committed in their presence. They saw petitioner pouring the clear liquid and smelled the distinctive odor of moonshine whiskey. In any event, under Georgia law, an officer may arrest without a warrant if the offender is trying to escape (see Pet. 4–5) and petitioner ran when the officers entered his premises.

It is immaterial that the search and seizure preceded the arrest by about ten minutes. The liquor was in open view and subject to seizure without necessity of a search. *United States* v. *Lee*, 274 U.S. 559; *United States* v. *Young*, 322 F. 2d 443 (C.A. 4). The officers had lawfully entered upon the premises to arrest petitioner and, if petitioner had not run away they would have arrested him immediately. The officers thus had the right to seize the contraband which

was before them in a place where they had a right to be. See *Harris* v. *United States,* 331 U.S. 145, 154–155. In any event: "When probable cause for an arrest exists independently of what the search produces, the fact that the search precedes the formal arrest is immaterial when the search and the arrest are nearly simultaneous and constitute for all practical purposes but one transaction." *Holt* v. *Simpson,* 340 F. 2d 853, 856 (C.A. 7); *United States* v. *Boston,* 330 F. 2d 937, 939 (C.A. 2); *Busby* v. *United States,* 296 F. 2d 328, 332 (C.A. 9), certiorari denied, 369 U.S. 876.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
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BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1969.

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